

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS BOYD CHANDLER, JR.,

Defendant and Appellant.

D074044

(Super. Ct. No. 16CR-002675)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Victor R. Stull, Judge. Affirmed in part; reversed in part and remanded for resentencing.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant
and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Stacy
Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

In March 2016, an inebriated Thomas Boyd Chandler, Jr., went to the home of his longtime neighbors, Michael L. and Jessica J., kicked in their front door, stepped inside, and said he was going to kill them and blow up the house. Charged with burglary, assault with a deadly weapon, and criminal threats, the jury convicted Chandler of only the lesser included offenses in counts 1 and 2, attempted first degree burglary (Pen. Code,¹ §§ 459, 460, subd. (a), 664) and misdemeanor assault (§ 240). The court imposed the upper term on count 1, resulting in an 11-year sentence based on a prior strike and five-year serious prior felony enhancement.

Chandler appeals the judgment on six grounds, but the People contest only three. Chandler claims that by instructing the jury with CALCRIM No. 3518 instead of CALCRIM No. 3517, the jury was unaware it could acquit as to the lesser included offense of attempted burglary in count 1. Next, he argues insufficient evidence supports that conviction, given his acquittals for both enumerated target offenses (assault with a deadly weapon and criminal threats). Finally, Chandler argues the court abused its discretion in selecting the three-year upper term for count 1. We reject each of these contentions or find any error harmless and make the corrections to the judgment conceded by the People.

After oral argument, Chandler obtained permission to file a supplemental brief addressing the impact of Senate Bill No. 1393 which, effective January 1, 2019, amends sections 667 and 1385 to grant trial courts discretion to strike a five-year prior serious

¹ Further statutory references are to the Penal Code unless otherwise indicated.

felony enhancement. (Stats. 2018, ch. 1013, §§ 1–2.) We agree with the parties that this new law applies retroactively to cases not yet final as of January 1, 2019. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971–972 [applying *In re Estrada* (1965) 63 Cal.2d 740, 744–745].) Given our record, we remand for a full resentencing hearing, where the court may consider whether to strike the prior serious felony enhancement under section 667, subdivision (a)(1).

FACTUAL AND PROCEDURAL BACKGROUND

Michael and Chandler were neighbors for 12 years. Michael lived with his wife Jessica and their two children; Chandler lived next door in his father's house. Chandler stored his weights in Michael's garage, and the two used to exercise together. At some point, Michael lent Chandler money. When Chandler did not repay him, Michael said he would keep the weights until he was repaid. This angered Chandler, but two years passed without apparent incident.

One day after drinking several beers, Chandler was feeling a "little aggressive." He hit Michael's garage door and may have demanded his weights. Hearing a loud boom coming from the garage, Michael investigated but saw nothing. He and Jessica then heard yelling and pounding near the front door. His daughter reported it was "Tom," and Michael went outside to find Chandler on his front lawn. When Michael asked Chandler what he was doing, Chandler allegedly pulled out a knife and ran at him, yelling he was going to kill him. Michael ran inside his house and closed the front door, telling Jessica to grab him a stick because Chandler had a knife. Jessica did not see a knife in Chandler's hands, and at trial the jury found the knife use allegation "not true."

Michael quickly closed and locked the front door. But Chandler immediately kicked it in, dislodging the deadbolt striker plate from the doorjamb. He stepped inside the house with one foot and immediately backed out. While doing this, he cursed and screamed, "I'm going to fuckin' kill you."

At some point, Michael grabbed a long stick (a broken shovel handle) from the garage. Jessica told her daughter to call 911. Chandler's father yelled at Chandler to "get his ass home," prompting him to leave. As Chandler walked to his father's house, he told Michael, who was then in the backyard, he was going to kill them and blow up their house. Jessica overheard these statements from their porch.

Law enforcement arrived and spoke to Michael and Jessica. Searching Chandler's home, they found a four-inch pocketknife. The knife slid "perfectly" into a hole discovered in Michael's garage door, and Michael identified it as the one he had seen Chandler carry.

The San Bernardino District Attorney charged Chandler with burglary (§ 459, count 1), assault with a deadly weapon (§ 245, subd. (a)(1), count 2), and criminal threats against Michael and Jessica (§ 422, subd. (a), counts 3 & 4). As to each count it was alleged that Chandler had personally used a deadly weapon, specifically a knife. (§ 12022, subd. (b)(1).)

At trial, the prosecutor examined Michael, Jessica, and sheriff's deputies. He urged the jury to convict Chandler of burglary because he stepped inside the home intending to commit assault with a deadly weapon or make criminal threats inside.

The defense theory was that Chandler committed a simple assault and nothing more. Chandler's father testified that his son was angry and "drunk" but unarmed. He saw his son near Michael's front door, waving his arms like an "ape" and challenging Michael to come outside. From what he observed, Chandler made no threats to kill anyone and did not enter the house. Chandler also took the stand, claiming he simply wanted his weights back, was unarmed, and kicked a closed door in anger (not intending to break in) as he turned to leave. The jury viewed surveillance video from a security camera at Chandler's home pointed at Michael's front door, which captured part of the incident.

The court instructed the jury on count 1 that it had to find that Chandler entered the home with the intent to commit assault with a deadly weapon *or* make criminal threats inside. It did not instruct the jury on *theft* as a target offense, noting that Chandler claimed the weights stored in Michael's garage were his.

The jury convicted Chandler of attempted first degree burglary, a lesser included offense of count 1. (§§ 459, 460, subd. (a), & 664.) It rejected the allegation attached to count 1 that Chandler personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)), unanimously finding the knife use allegation "not true." The jury also found Chandler guilty of misdemeanor assault (§ 240), a lesser included offense of count 2. It acquitted on the criminal threats charges in counts 3 and 4.

Chandler waived his right to jury trial on his alleged prior, and the court found that he had been convicted of attempted robbery (§§ 211, 664) in 2001. That prior conviction was both a serious felony (§ 667, subd. (a)(1)) and a strike (§§ 667, subds. (b)–(i) &

1170.12, subds. (a)–(d)). (See *People v. Nelson* (1996) 42 Cal.App.4th 131, 136 [dual use of prior felony as a strike and an enhancement is permitted].)

In his sentencing brief, Chandler argued the verdicts were inconsistent, warranting a new trial or modification to strike the conviction on count 1. He also asked the court to strike his prior conviction for attempted robbery. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*); § 1385, subd. (a).)

In January 2017, the court denied Chandler's new trial and *Romero* motions and sentenced him to a total term of 11 years in state prison, calculated as the upper term of three years on count 1, doubled for the strike prior (§§ 667, subds. (b)–(i) & 1170.12, subds. (a)–(d)), plus a five-year enhancement for the prior serious felony conviction (§ 667, subd. (a)(1)).

DISCUSSION

Chandler raises six contentions on appeal. The People concede the latter three, and we accept these concessions.² The contested issues all involve Chandler's conviction for attempted first degree burglary in count 1 and the sentence imposed. Chandler first contends the court prejudicially erred in instructing the jury with CALCRIM No. 3518

² As the People concede, section 667.5, subdivision (a) creates a sentencing enhancement for violent felonies, which are listed in subdivision (c). Although burglary is a violent felony under subdivision (c)(21) of the statute, *attempted* burglary is not. (See *People v. Ibarra* (1982) 134 Cal.App.3d 413, 425.) Accordingly, we strike the "person present" allegation under section 667.5, subdivision (c)(21) attached to count 1. In addition, we modify the judgment to reflect that Chandler received 177 days of actual credit plus 177 days of conduct credit (§ 4019), and we direct the superior court to correct the clerical error in the June 16, 2016 minute order to reflect that the jury found the weapon use allegation attached to count 1 "not true." (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [courts have inherent power to correct clerical errors].)

instead of 3517 regarding completion of verdict forms, suggesting the error misled the jury that it could not *acquit* Chandler of the lesser included offense. Next, he maintains there was insufficient evidence to support his conviction for attempted burglary, highlighting that the jury acquitted him in counts 2 through 4 of the sole possible target offenses for that crime. Finally, Chandler argues the court abused its discretion in imposing a three-year upper term for attempted first degree burglary. We address these contentions in turn before considering Chandler's post-argument request for a new sentencing hearing in light of Senate Bill No. 1393.

1. *Any Error in Giving CALCRIM No. 3518 Was Harmless*

CALCRIM Nos. 3517 and 3518 instruct the jury on how to complete verdict forms. CALCRIM No. 3518 (Deliberations and Completion of Verdict Forms: For Use When Lesser Included Offenses and Greater Crimes Are Not Separately Charged and Jury Is Given Only One Not Guilty Verdict Form for Each Count (Non-Homicide)) applies when the jury receives a single not guilty form for the entire count. By contrast, CALCRIM No. 3517 (Deliberations and Completion of Verdict Forms: For Use When Lesser Included Offenses and Greater Crimes Are Not Separately Charged and the Jury Receives Guilty and Not Guilty Verdict Forms for Greater and Lesser Offenses (Non-Homicide)) applies when there are separate not-guilty verdict forms for the greater and lesser offenses.³

³ CALCRIM No. 3517 provides: "For [any] count in which a greater and lesser crime is charged, you will receive verdict forms of guilty and not guilty for the greater crime and also verdict forms of guilty and not guilty for the lesser crime. Follow these

Chandler argues the court erred in giving CALCRIM No. 3518 instead of CALCRIM No. 3517 for count 1 because there were separate not-guilty forms for the greater and lesser offenses.⁴ He suggests the error was compounded when, in reading the verdict forms to the jury, the court read out only *three* options—convict of burglary, acquit of burglary, or convict of attempted burglary. Chandler suggests the court's instructions directed the jury to choose one of these three options, suggesting "there was no possible verdict of not guilty on the lesser offense."

As we explain, the error is more complex than Chandler suggests in his opening brief, but it was nevertheless harmless. The jury was repeatedly told, including in CALCRIM No. 3518, that it could not convict Chandler of *any* offense absent proof beyond a reasonable doubt. There is no reasonable likelihood it convicted Chandler of

directions before you give me any completed and signed, final verdict form. Return any unused verdict forms to me, unsigned. [¶] 1. If all of you agree the People have proved that the defendant is guilty of the greater crime, complete and sign the verdict form for guilty of that crime. Do not complete or sign any other verdict form for that count. [¶] 2. If all of you cannot agree whether the People have proved that the defendant is guilty of the greater crime, inform me only that you cannot reach an agreement and do not complete or sign any verdict form for that count. [¶] 3. If all of you agree that the People have not proved that the defendant is guilty of the greater crime and you also agree that the People have proved that (he/she) is guilty of the lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for guilty of the lesser crime. [¶] 4. If all of you agree the People have not proved that the defendant is guilty of the greater or lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for not guilty of the lesser crime. [¶] 5. If all of you agree the People have not proved that the defendant is guilty of the greater crime, but all of you cannot agree on a verdict for the lesser crime, complete and sign the verdict form for not guilty of the greater crime and inform me only that you cannot reach an agreement about the lesser crime."

⁴ Although the same could be said for count 2, Chandler does not challenge that conviction because he conceded guilt on the lesser included offense of simple assault.

attempted burglary in count 1 unaware of this rule or because of a misconception that it had no option to acquit.

a. *Additional background*

During the conference on jury instructions, the court stated its intent to instruct the jury with CALCRIM No. 3518. Defense counsel did not object. CALCRIM No. 3518 properly instructed the jury as to counts 3 and 4, for which the jury received a not-guilty verdict form for the entire count. But the verdict forms for counts 1 and 2 gave the jury four options (guilty of the greater, not guilty of the greater, guilty of the lesser, not guilty of the lesser).

Near the end of trial, the court noted this issue and commented that CALCRIM No. 3518 was designed for a count limited to only three verdict forms (guilty of the greater, guilty of the lesser, or not guilty of any crime). It decided to address the issue by omitting verdict forms "1-D" and "2-D." In other words, for count 1, the jury received verdict forms "1-A" [guilty of burglary], "1-B" [not guilty of burglary], and "1-C" [guilty of attempted burglary]. The court believed this course of action would fit the verdict forms for counts 1 and 2 into CALCRIM No. 3518's framework.

As provided to the jury, CALCRIM No. 3518 stated in relevant part:

"If all of you find that the defendant is not guilty of a greater charged crime, you may find him guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct.

"Now I will explain to you which charges are affected by this instruction:

"Attempted Burglary is a lesser crime of the Burglary charged in Count One. [¶] . . . [¶]

"It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime.

"For all counts you will receive multiple verdict forms. Follow these directions before you give me any completed and signed, final verdict form. Return any unused verdict forms to me, unsigned.

"1. If all of you agree the People have proved that the defendant is guilty of the greater crime, complete and sign the verdict form for guilty of that crime. Do not complete or sign any other verdict form for that count.

"2. If all of you agree the People have not proved that the defendant is guilty of the greater crime and also agree the People have proved that he is guilty of the lesser crime, complete and sign the verdict form for guilty of the lesser crime. Do not complete or sign any other verdict forms for that count.

"3. If all of you agree the People have not proved that the defendant is guilty of the greater or lesser crime, complete and sign the verdict form for not guilty for that count.

"4. If all of you cannot agree whether the People have proved that the defendant is guilty of a charged or lesser crime, inform me only that you cannot reach agreement as to that count and do not complete or sign any verdict form for that count.

"Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt."

During deliberations, the jury returned with initial verdict forms for count 1 finding Chandler "not guilty" of burglary and "guilty" of the lesser included offense of attempted burglary. The court reminded jurors of steps one through four in CALCRIM No. 3518 and told them to complete and sign only one "guilty" verdict form if it

convicted on the greater or lesser offense. The jury received new verdict forms but proceeded to make the same mistake as to count 2. Ultimately, the jury completed and signed a single verdict form for count 1, finding Chandler guilty of the lesser included offense.

b. *Analysis*

Chandler is correct that CALCRIM No. 3517 would have been the appropriate instruction had the jury been provided with verdict forms "1-A" through "1-D." The People make no argument to the contrary. Instead, they argue CALCRIM No. 3518 was correct because the jury actually received only *three* forms, not four. But the jury did not receive a form to acquit Chandler altogether on count 1, as CALCRIM No. 3518 envisions. It instead received form "1-B" to acquit him of the *greater* offense. As Chandler notes in his reply, the omission of form "1-D" created a separate problem, leaving the jury without a verdict form to acquit Chandler of attempted burglary.

Nevertheless, we conclude the error was harmless.⁵ We consider the instructions given as a whole, not parts of an instruction or a particular instruction in isolation. (*People v. Young* (2005) 34 Cal.4th 1149, 1202.) "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the

⁵ The People argue Chandler forfeited this claim of error by failing to object below. Chandler argues the court had a sua sponte duty to correctly instruct the jury on how to complete the verdict forms. He alternatively argues counsel rendered ineffective assistance by failing to object. Whether addressed directly or through the lens of a defendant's Sixth Amendment right to effective assistance of counsel, the contention fails absent a showing of prejudice. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687–688; *People v. Ledesma* (1987) 43 Cal.3d 171, 216–218.)

court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) There is no prejudice absent a reasonable likelihood the jury was misled in the manner Chandler suggests. (*People v. Kelly* (1992) 1 Cal.4th 495, 525–526; *People v. Tate* (2010) 49 Cal.4th 635, 696.)

The very first line of CALCRIM No. 3518 told the jury it could not convict Chandler of a lesser crime *unless* it was "convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime." The last sentence reiterated the point: "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt." (CALCRIM No. 3518.)

CALCRIM No. 220 instructed that Chandler was "presumed to be innocent," requiring the People to prove guilt "beyond a reasonable doubt." It reiterated the point made in CALCRIM No. 3518: "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt." (CALCRIM No. 220.) The instruction further stated, "Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty." (*Ibid.*)

Jurors were likewise instructed pursuant to CALCRIM No. 224 that before relying on circumstantial evidence to find a fact necessary for guilt, they "must be convinced that the People proved each fact essential to that conclusion beyond a reasonable doubt." CALCRIM No. 359 underscored that the jury could not convict Chandler "unless the People have proved his guilt beyond a reasonable doubt." As to the weapon use allegation, the jury was instructed under CALCRIM No. 3145 to find the allegation not

true if the People did not meet their burden to prove the allegation beyond a reasonable doubt.

Taken together, these instructions adequately informed jurors of the presumption of innocence, the prosecution's burden of proof, and the proof beyond a reasonable doubt requirement to convict Chandler of any offense. It is not reasonably likely that the jury would have understood CALCRIM No. 3518 as given, in combination with verdict forms "1-A," "1-B," and "1-C" as a directive to convict of the lesser offense notwithstanding a failure of proof beyond a reasonable doubt.

Although Chandler does not cite it, *People v. Schindler* (1972) 23 Cal.App.3d 369 is distinguishable. The trial judge in *Schindler* effectively told the jury that "if it could not agree, one way or another, on the basic charge of murder, its only options were to find defendant guilty of voluntary or involuntary manslaughter." (*Id.* at p. 378.) The prejudicial effect of this erroneous instruction was "obviously heightened by the fact that no forms of verdict finding the defendant not guilty of voluntary or involuntary manslaughter were furnished to the jury." Here, the trial court never directed the jury that its "only option" was to convict of the lesser offense. (*Ibid.*) CALCRIM No. 3518 listed acquittal of the lesser offense among the options, and the jury was told it could not convict of any offense absent proof beyond a reasonable doubt.

Instead, this case parallels *People v. Osband* (1996) 13 Cal.4th 622 (*Osband*). There, a trial judge read some verdict forms to the jury but failed to read any forms returning a "not guilty" verdict for first degree murder or rape. (*Id.* at p. 689.) It also failed to give the jury "not guilty" forms for those offenses. (*Ibid.*) The defendant

challenged the court's failure to provide all verdict forms and read them correctly, arguing these errors "directed the jury to return guilty verdicts." (*Ibid.*) The Supreme Court concluded any error was harmless; the jury had been instructed that to convict, it had to find guilt beyond a reasonable doubt. (*Id.* at pp. 689–690.) Therefore, any failure to provide a "not guilty" verdict form or describe that verdict to the jury was harmless; " 'it must be presumed that if [the jurors'] conclusion called for a form of verdict with which they were not furnished, they would either ask for it or write one for themselves.' " (*Ibid.*, citing *People v. Hill* (1897) 116 Cal. 562, 570.)

Here, the court correctly described the jury's four options as to each of the counts in reading CALCRIM No. 3518. It could convict Chandler of the greater offense, convict him of the lesser offense, find him "not guilty" of the greater and the lesser offense, or report no agreement. As in *Osband*, the court failed to tell the jury about the possibility of acquitting Chandler of the lesser offense of attempted burglary or provide a verdict form to that effect. Nevertheless, as in *Osband, supra*, 13 Cal.4th 622, each of the instructions underscored the proof beyond a reasonable doubt requirement. Any error was not reasonably likely to have led the jury to believe it could not acquit Chandler of attempted burglary.⁶

Chandler raises two additional arguments regarding prejudice, neither of which is persuasive. First, he claims the jury showed its confusion by returning signed verdict

⁶ Chandler argues the error was prejudicial because it was "clear" and "repeated." But the record here is similar to *Osband*, which found no prejudice from similar defects.

forms on both the greater and lesser offenses. The jury did initially return two signed verdict forms in count 1 reflecting acquittal on the greater and conviction on the lesser. But these forms merely show that the jury followed CALCRIM No. 3518's process in acquitting on the greater offense before convicting of the lesser, not that it was confused whether it had the option to acquit on the lesser offense.⁷ Next, Chandler argues the jury reached a verdict advanced by neither side; the prosecution argued a completed burglary whereas the defense argued Chandler never entered or intended to commit a felony inside. But the jury was instructed on the offense of attempted burglary (CALCRIM No. 460), and as we explain in the next section, sufficient (albeit not overwhelming) evidence supports that verdict.

In sum, any errors in giving CALCRIM No. 3518, in not describing to the jury a verdict of acquittal of attempted burglary, and in failing to provide the jury with verdict form "1-D" were harmless given the repeated instructions on proof beyond a reasonable doubt. (*Osband, supra*, 13 Cal.4th at pp. 689–690.)

2. *Sufficient Evidence Supports Chandler's Attempted Burglary Conviction*

The jury acquitted Chandler of the two target felonies underlying the burglary charge when it convicted him of only misdemeanor assault (§ 240) and acquitted him of criminal threats (§ 422). It nevertheless convicted him of attempted burglary (§§ 459,

⁷ Chandler points to the court's instruction after receiving the initial verdict forms, "if it is your intention to convict of either the offense charged, which is first-degree burglary or [the lesser offense of] attempted burglary, give me a guilty form as to one or the other but don't give me a not-guilty form." Read in context, it is clear that the court was telling the jury *not* to return a not guilty form on the greater offense if it agreed to convict on the lesser, as it had in initially filling out the verdict forms.

460, subd. (a), 664), rejecting the allegation that he used a knife in committing that offense (§ 12022, subd. (b)(1)). Chandler argues there is insufficient evidence to support two required elements of attempted burglary—intent to enter Michael's house and intent to commit a specified target offense inside. But as we explain, acquittal on the target offenses does not invalidate the attempted burglary conviction. Although the verdicts are inconsistent, there is sufficient evidence to support Chandler's conviction on count 1.⁸

"[A]s a general rule, inherently inconsistent verdicts are allowed to stand."

(*People v. Lewis* (2001) 25 Cal.4th 610, 655–656 (*Lewis*).) "The law generally accepts inconsistent verdicts as an occasionally inevitable, if not entirely satisfying, consequence of a criminal justice system that gives defendants the benefit of a reasonable doubt as to guilt, and juries the power to acquit whatever the evidence." (*People v. Palmer* (2001) 24 Cal.4th 856, 860.) "An inconsistency may show no more than jury lenity, compromise, or mistake, none of which undermines the validity of a verdict." (*Lewis*, at p. 656.)

Accordingly, "if an acquittal of one count is factually irreconcilable with a conviction on another, or if a not true finding of an enhancement allegation is inconsistent with a

⁸ The People imply that the verdicts are not necessarily inconsistent because the jury might have found that Michael and Jessica were not subjectively afraid, or that a reasonable person in their shoes would not have felt sustained fear from Chandler's "bombastic threats." The completed crime of criminal threats requires that the victim be in sustained fear. (§ 422, subd. (a); *People v. Toledo* (2001) 26 Cal.4th 221, 227–228; see CALCRIM No. 1300.) And to prove an attempted criminal threat, First Amendment concerns dictate that a defendant's statement must cause a reasonable person to sustain fear. (*People v. Chandler* (2014) 60 Cal.4th 508, 525; see CALCRIM No. 460.) But the jury's acquittal of *attempted* criminal threats in counts 3 and 4 suggests that at most, Chandler entered Michael's home intending to say that which would not amount to a felony. We do not believe the verdicts can be harmonized, but nonetheless find sufficient evidence on count 1 to affirm.

conviction of the substantive offense, effect is given to both.' " (*People v. Avila* (2006) 38 Cal.4th 491, 600 (*Avila*); see § 954 ["An acquittal of one or more counts shall not be deemed an acquittal of any other count."].)⁹

" 'Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. [Citations.] This review should be independent of the jury's determination that evidence on another count was insufficient.' " (*Lewis, supra*, 25 Cal.4th at p. 656, citing *United States v. Powell* (1984) 469 U.S. 57, 67.) In other words, " 'there is no prohibition against considering all of the evidence in the record to determine the sufficiency of evidence on one count merely because the jury did not reach a unanimous verdict on a count to which the evidence may have related.' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890 (*Covarrubias*).)

In convicting Chandler of attempted burglary, the jury unanimously found that he did not use a knife. As a result, it could not have based its conviction in count 1 on entry

⁹ Justice Ming W. Chin, then with Division Three of the First Appellate District, provided historical context in *People v. Pahl* (1991) 226 Cal.App.3d 1651. Before 1927, California courts "held that inconsistent verdicts 'would not support a judgment of conviction.' " (*Id.* at p. 1656.) Section 954 was amended "[i]n apparent response to these decisions." (*Pahl*, at p. 1656.) "This amendment made clear that each count must stand on its own, and a verdict on one has no bearing on any other. Therefore, the fact that a guilty verdict on one count is inconsistent with an acquittal verdict on another no longer compels reversal if there is substantial evidence to support the conviction." (*Id.* at pp. 1656–1657.) "Simply put, 'Consistency in the verdict is not necessary.' " (*Id.* at p. 1657, citing *Dunn v. United States* (1932) 284 U.S. 390, 393; see also *People v. Codina* (1947) 30 Cal.2d 356, 360 [defendant charged with lewd conduct and contributing to the delinquency of a minor based on a single act was convicted of only the latter offense; conviction was affirmed under § 954].)

with the intent to commit an assault with a deadly weapon. This eliminates one of two target offenses for attempted burglary offered to the jury.¹⁰

But we may reverse for insufficient evidence only if " 'upon no hypothesis whatever is there sufficient substantial evidence to support' " the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) This requires us to "review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Ibid.*)

Here, there was sufficient evidence for the jury to convict Chandler of attempted burglary based on an intent to enter and to commit a criminal threat inside. Chandler tried to kick open the front door while cursing and screaming, "I'm going to fuckin' kill you." He struck the locked door with enough force to dislodge the deadbolt striker plate, swing the door open, and step inside.¹¹ From this evidence, a reasonable jury could conclude that Chandler intended to enter the home and intended to commit or attempt a

¹⁰ The People proffer a new theory on appeal—that Chandler intended to enter Michael's home and commit an assault by means of force likely to produce great bodily injury, a felony (§ 245, subd. (a)(4)). This uncharged felony was never presented as a target offense for the burglary to the jury, and we therefore do not consider it. (*Cole v. Arkansas* (1948) 333 U.S. 196, 202 [to conform with due process, a defendant is "entitled to have the validity of [his] convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court"]; *People v. Kunkin* (1973) 9 Cal.3d 245, 251 ["We, of course, cannot look to legal theories not before the jury in seeking to reconcile a jury verdict with the substantial evidence rule."].)

¹¹ Chandler argues that by acquitting him of burglary, the jury necessarily rejected that he entered Michael's home. But as the People point out, the jury was told it could convict Chandler of attempted burglary "even if you conclude that Burglary was actually completed." (CALCRIM No. 460.) Chandler's acquittal does not mean the jury found that he did not step inside the house.

criminal threat inside. That the jury acquitted Chandler of making or attempting criminal threats in counts 3 and 4 demonstrates an inconsistent verdict but does not compel a different result.

Acknowledging the general rule on inconsistent verdicts, Chandler nevertheless argues that we are not authorized to "ignore the state of the evidence as presented to the jury" or substitute our view of the evidence "for the jury's legal determinations that [he] did not threaten, attempt to threaten, or assault anyone with a knife." We agree as to the assault—the jury's "not true" finding on the knife use allegation attached to count 1—and we cannot ignore *that* finding in evaluating the sufficiency of the evidence as to *that* conviction. But the law is clear that the jury's acquittals on counts 3 and 4 have no bearing on our sufficiency-of-the-evidence review for count 1, even if the verdicts are inconsistent. (*Lewis, supra*, 25 Cal.4th at pp. 655–656; *Avila, supra*, 38 Cal.4th at p. 600; *Covarrubias, supra*, 1 Cal.5th at p. 890; § 954.)

Finally, Chandler argues the "overwhelming evidence" demonstrated that he remained outside the home, kicked the door without forcing his way inside, and wanted to retrieve his weights, not threaten Michael or Jessica. But on sufficiency-of-the-evidence review, "[w]e do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses." (*People v. Riazati* (2011) 195 Cal.App.4th 514, 532.) The testimony of Michael and Jessica support a finding that Chandler intended to enter the home and intended to commit a criminal threat once inside. (*People v. Prunty* (2015) 62 Cal.4th 59, 89 [unless physically impossible or inherently improbable, testimony of a single witness suffices].)

3. *No Abuse of Discretion in Selecting the Upper Term on Count 1*

Finally, Chandler argues the trial court abused its discretion in imposing the upper term of three years on count 1. The question is whether the decision "exceeds the bounds of reason"—not whether we, or even most other trial judges, would have reached the same conclusion. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) Because a single factor in aggravation can support the imposition of the upper term (*Osband, supra*, 13 Cal.4th at p. 730), we cannot say the trial court abused its discretion.¹²

a. *Additional background*

At sentencing, defense counsel sought a middle term on count 1 because the offense was less serious than the typical burglary attempt; Chandler was not armed; no one was physically injured; and this offense was "clearly a function of Mr. Chandler's inability to handle alcohol." Counsel further argued that Chandler's history consisted almost entirely of misdemeanors, and his prior strike occurred over 14 years ago.

The prosecution disagreed, joining the probation department's assessment that: (1) the crime involved the threat of great bodily harm; (2) Chandler had engaged in violent conduct indicating a serious danger to society; (3) he had numerous prior convictions of increasing seriousness; (4) he had served a prior prison term; (5) he was on probation or under conditional and revocable release when the crime was committed; and (6) he had unsatisfactory performance on probation or conditional and revocable release.

¹² Nevertheless, we remand for resentencing in light of Senate Bill No. 1393, as explained in section 4, *post*. On remand the court may, of course, reassess imposition of the upper term on count 1. (*People v. Buycks* (2018) 5 Cal.5th 857, 893 (*Buycks*).)

Based on these aggravating factors, the prosecutor recommended the aggravated term of three years, doubled for the strike.

The court relied on the same six aggravating factors to impose the upper term:

"[I]n the commission of the offense, the crime did involve a threat of great bodily harm. As to the defendant, the defendant has engaged in violent conduct that indicates serious danger to society. He has previous convictions as an adult, which are numerous and increasingly serious. [¶] Mr. Chandler has served a prior prison term. He was off [a] grant of conditional and revocable release when this crime was committed. And the defense's [*sic*] prior performance on probation/revocable release was unsatisfactory. [¶] With respect to circumstances in mitigation, the defendant did believe that he had a claim or right to the property. It may have been legitimate, but there was a way to go about perfecting that claim, and it was not the way that he decided to do it. [¶] With respect to circumstances in mitigation that relate to the defendant, none are found. [¶] On balance, the Court does find that the appropriate term is the aggravated term for the reasons stated."

b. *Analysis*

We review a trial court's sentencing decision for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) A court must exercise its sentencing discretion "in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' " (*Id.* at p. 847.)

"Sentencing courts have wide discretion in weighing aggravating and mitigating factors." (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1258 (*Lai*).) A single aggravating factor suffices to support imposition of the upper term. (*Osband, supra*, 13 Cal.4th at p. 730; *People v. Black* (2007) 41 Cal.4th 799, 813.) Even if the court erred in applying one or more factors, resentencing is not required unless it is reasonably probable a more

favorable sentence would have otherwise been imposed. (*Osband*, at p. 728; *People v. Price* (1991) 1 Cal.4th 324, 492 (*Price*) ["When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper."].)

Chandler does not contest two of the aggravating factors cited by the court. The court relied on the related facts that Chandler committed the offense while on conditional release, and his performance on conditional release was thus unsatisfactory. (Cal. Rules of Court, rule 4.421(b)(4)–(b)(5).)¹³ The probation report indicated that at the time of the offense, Chandler was on conditional and revocable release following a misdemeanor conviction for carrying a dirk or dagger in violation of section 21310. Chandler makes no argument that the court erred in considering these two factors, and these alone support the imposition of the upper term. (*Osband*, *supra*, 13 Cal.4th at p. 730; see *Price*, *supra*, 1 Cal.4th at p. 492 [no prejudice where defendant conceded that three of seven aggravating factors considered at sentencing were permissible].)

Turning to Chandler's contentions, he disagrees that the attempted burglary was a violent crime involving a threat of great bodily harm, noting the court released him on his own recognizance pending trial. But the trial court voiced regret in having released Chandler on his own recognizance, noting he had picked up another misdemeanor theft conviction during his release. Chandler further notes that the court could not aggravate

¹³ Further rule references are to the California Rules of Court.

his sentence using the same fact constituting an element of the offense (i.e., the threat underlying the attempted burglary). (Rule 4.420(d).)¹⁴ Even if the court erred in finding that the offense involved violent conduct or a threat of great bodily harm, Chandler does not dispute that it properly relied on other aggravating factors, leaving no reasonable probability a more favorable sentence would have otherwise been imposed. (*Osband, supra*, 13 Cal.4th at p. 730.)

Next, Chandler argues the court misconstrued his criminal record in selecting the upper term—he had numerous prior *misdemeanor* convictions that were mostly alcohol-related, and none were more serious than his strike. To the extent the court relied on his strike as the "serious" previous conviction, it could not be used to aggravate and enhance the sentence. (§ 1170, subd. (b); Rule 4.420(c).)¹⁵

There is no indication the court misconstrued Chandler's record. In denying his *Romero* motion, it noted Chandler had "a long record of criminal law transgressions, [of] various grades of seriousness," most of which "unfortunately . . . seem to be related to alcohol." Chandler is correct that the vast majority of his ten prior offenses between 1999 and 2014 were misdemeanors, ranging from driving under the influence to vandalism, assault, and battery. But he did have a felony apart from the strike, a 2010

¹⁴ Rule 4.420(d) provides: "A fact that is an element of the crime on which punishment is being imposed may not be used to impose a particular term."

¹⁵ Section 1170, subdivision (b) provides, in relevant part, "the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed." Rule 4.420(c) provides, in relevant part: "To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing a particular term only if the court has discretion to strike the punishment for the enhancement and does so."

criminal trespass conviction in Arizona. We cannot say the court erred in deeming his convictions "of increasing seriousness." (See *People v. Ramos* (1980) 106 Cal.App.3d 591, 609–610 [robbery defendant's prior minor juvenile offenses and adult convictions for petty theft and driving without a license were of increasing seriousness], accord *People v. Black* (2007) 41 Cal.4th 799, 818.) Moreover, even if the court misconstrued his criminal record, it is not reasonably likely this factor dictated the sentence given its proper reliance on Chandler's poor performance during conditional release. (*Osband, supra*, 13 Cal.4th at p. 730.)

Finally, Chandler argues the court ignored several mitigating factors, including the fact that no one was physically harmed. (See Rule 4.423 [circumstances in mitigation].) We have no reason to believe these factors were ignored; Chandler listed them in his sentencing brief, which the court stated it read. (*People v. King* (2010) 183 Cal.App.4th 1281, 1322 [" 'unless the record affirmatively indicates otherwise, the trial court is deemed to have considered all relevant criteria, including any mitigating factors' "]; Rule 4.409.) A trial court need not state its reasons for minimizing or disregarding factors in mitigation. (*Lai, supra*, 138 Cal.App.4th at p. 1258.)

In sum, the court did not abuse its discretion in imposing a three-year upper term on count 1. Although a close call, the fact that the court cited two concededly proper factors in aggravation indicates it is not reasonably probable the court would have imposed a lesser sentence had it declined to consider improper ones. (*Osband, supra*, 13 Cal.4th at p. 730; *Price, supra*, 1 Cal.4th at p. 492.) Nevertheless, because we remand

the matter for a full resentencing hearing for reasons discussed below, the court may revisit its sentencing choices at resentencing. (*Buycks, supra*, 5 Cal.5th at p. 893.)

4. *Resentencing Is Warranted by Senate Bill No. 1393*

On September 1, 2018, after briefing in this appeal was complete, the Governor signed Senate Bill No. 1393 into law. (Stats. 2018, ch. 1013.) Effective January 1, 2019, sections 667 and 1385 permit trial courts to exercise discretion at sentencing to strike or dismiss five-year prior serious felony enhancements in "furtherance of justice." (*Id.* at §§ 1–2.) Previously, courts lacked such discretion. (§§ 667, former subd. (a)(1), 1385, former subd. (b); *People v. Williams* (1987) 196 Cal.App.3d 1157, 1160.)

After oral argument, Chandler sought to file a supplemental brief addressing the impact of the new law. The Attorney General concedes that, effective January 1, 2019, the law applies retroactively to nonfinal cases. We agree and accept this concession. As Division Two of this District concluded in *People v. Garcia, supra*, 28 Cal.App.5th at pages 971 to 972, because Senate Bill No. 1393 vests the trial court with discretion to impose the same or a lesser penalty, it "applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction, provided the judgment of conviction is not final" on the effective date of the legislation.

Despite its concession, the Attorney General maintains remand is nevertheless unwarranted. Citing *People v. McDaniels* (2018) 22 Cal.App.5th 420 at page 425 (*McDaniels*), it argues resentencing is not required because " 'the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in

any event have stricken a [serious prior felony] enhancement.' " To support its stance, the Attorney General relies on general statements by the sentencing judge in denying Chandler's *Romero* motion and imposing the upper term as indicating the court would not have applied its discretion to strike the serious prior felony enhancement.

McDaniels stands for the proposition that where "the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required." (*McDaniels, supra*, 22 Cal.App.5th at p. 425, internal quotation marks omitted.) Our record does not fit that rubric. The court imposed the upper term on count 1, doubled it for the strike prior, and indicated the enhancement under section 667, subdivision (a)(1) would add five years. Although it denied Chandler's *Romero* motion, it acknowledged his criminal history was "unfortunately" fueled by alcohol. In assessing presentence credit, the court commented, "this is a serious felony, but not a violent felony." In short, the court imposed a "substantial sentence" on Chandler, but the record "contains no clear indication of an intent by the trial court not to strike [the serious prior felony enhancement]." (*McDaniels*, at pp. 427–428.) Because "nothing in the record rules out the possibility that the court would exercise its discretion to strike [this] enhancement," remand is proper. (*Id.* at p. 428.) We express no opinion on how the court should exercise its discretion on remand.

"[W]hen part of a sentence is stricken on review, on remand for resentencing 'a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.' " (*Buycks, supra*, 5 Cal.5th

at p. 893.) Accordingly, the trial court is not *limited* at resentencing to considering whether to strike or impose the five-year enhancement for a serious prior felony under section 667, subdivision (a)(1), as amended effective January 1, 2019.

DISPOSITION

The matter is remanded for a full resentencing hearing, where the court may in its discretion decide whether to strike the five-year enhancement for Chandler's serious prior felony under section 667, subdivision (a)(1).

In addition, the clerk of the superior court is directed to correct the June 16, 2016 minute order by: (1) indicating that the jury found the weapon use allegation attached to count 1 (Pen. Code, § 12022, subd. (b)(1)) to be "not true," and (2) deleting the line indicating the jury made any weapon use finding on count 3. The trial court is further directed to modify the January 20, 2017 minute order to (1) strike the "person present" true finding under section 667.5, subdivision (c)(21); and (2) reflect Chandler's receipt of 177 days of actual credit plus 177 days of conduct credit pursuant to section 4019. The amended abstract of judgment should also be corrected to reflect the imposition of the strike prior (§§ 667, subds. (b)–(i) & 1170.12, subds. (a)–(d)) to reach the six-year term for count 1, and the correct number of section 4019 credits.

Upon resentencing, the clerk of the superior court shall prepare an amended abstract of judgment reflecting the corrections noted above and conforming to the court's oral pronouncement of the judgment at resentencing. The clerk is directed to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

DATO, J.

WE CONCUR:

McCONNELL, P. J.

GUERRERO, J.